

DEPARTMENT OF STATE REVENUE

REVENUE RULING ST 96-11

JANUARY 7, 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

The taxpayer is a provider of professional computing services. The taxpayer provides several types of services bundled in several different combinations. Many of these services involve canned and/or custom software and other tangible personal property. Each of these services will be addressed separately.

AEG

STATEMENT OF FACTS

This service provides computer training services (in both hardware and software) to the taxpayer's clients and their staff. This requires up-front consultation with the client as to their specific needs. The upfront consultation generally results in a written or oral report, and at the client's discretion, may lead to an engagement to design an education program. In that case, the taxpayer designs a unique training program based on those needs, and provides classroom training at the client's location, the taxpayer's local branch office or at another facility.

The taxpayer also assists clients with designing their own in-house training. This service involves upfront consultation as mentioned above, but the taxpayer does not provide any training services.

The taxpayer offers certification programs in various software disciplines, such as Novell, Lotus Notes, and Microsoft NT. Hands-on Internet training is also provided; however, the taxpayer is not a provider or seller of Internet service.

Fees for these services are determined on a per-course basis, on a per-attendee basis, or some combination thereof. These fees are separately stated on the invoice. In addition, on certain engagements, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.). These reimbursable expenses are also separately stated on the invoice.

The software vendor (such as Lotus and Novell) determines the course requirements, in terms of materials (manuals, disks, etc.). The taxpayer orders these directly from the vendor strictly on an as-needed basis and does not keep a supply on hand. This courseware is included in the price of the class and not separately billed.

Provision of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

Sales tax is imposed on retail transactions in Indiana. IC 6-2.5-2-1(a) states, "[a]n, excise tax known as the state gross retail tax, is imposed on retail transactions made in Indiana." Subsection (b) requires that the retail merchant collect the tax as agent for the state. Retail transactions are sales of tangible personal property and those sales of services specifically designated to be retail transactions pursuant to IC 6-2.5-4. Professional services are not subjected to tax.

45 IAC 2.2-4-2 states:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where in conjunction with rendering professional services, personal services, or other services, the service man also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in the taxable gross receipts of the retail merchant.

(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.

(d) A serviceman occupationally engaged in rendering professional, personal or other service will be

presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in 6-2.5-4-1(c)(010), paragraph (1) [subsection (a) of this section], the gross retail tax shall not apply to such transaction.

The taxpayer is clearly a service provider in the above context. To the extent that the property transferred is 10% or less compared to the service charge, no tax would be due.

RULING

The taxpayer is not required to collect Indiana sales and use tax on its AEG training and consulting services. The taxpayer should not collect Indiana sales and use tax on reimbursed expenses because the taxpayer is a service provider and the charges are separately listed on the invoice. However, the taxpayer is required to self accrue Indiana use tax on the courseware.

ASG

STATEMENT OF FACTS

This service involves design and development of client-specific programs and databases using "canned" (commercial) software (such as Lotus Notes), including upfront consultation with the client as to their specific needs and review of their existing programs and systems. The upfront consultation generally results in a written or oral report containing recommendations for a software program. At the client's discretion, the report may lead to an engagement to design, test, install and de-bug the program. The software programs used in this service are application software, not operating software.

The taxpayer does not have permission from the software companies to change the source codes of their programs; however, the programs the taxpayer designs are unique to the client and can have no general application outside of the client's business. The software itself has been developed to be easily adapted to various operating environments. The taxpayer may also provide training for client personnel in the use and functions of the software programs designed for them.

Provision of these training services is not a mandatory element of the contract to design software; the client may elect to avail themselves of these services at their discretion. These training services are separately invoiced.

The taxpayer's fees for these services are determined based on an hourly rate, or the taxpayer may provide a flat quote after an initial evaluation, or participate in ongoing contracts for fixed periods of time. These fees are separately stated on the invoice. In addition, on certain engagements, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.). These reimbursable expenses are also separately stated on the invoice.

No materials or supplies are used, aside from the copy of canned software used to begin creating the client's program.

Provision of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

The sale of custom software is not subject to tax in Indiana. It is generally considered a professional service pursuant to 45 IAC 2.2-4-2. This conclusion is reflected in Sales Tax Information Bulletin #8, which states, "[a]s a general rule, transactions involving computer software are not subject to Indiana Sales of Use Tax provided the software is in the form of a custom program specifically designed for the purchaser."

RULING

The taxpayer is not required to collect Indiana sales or use tax on its ASG software programming. The taxpayer must pay use tax on the underlying canned software used to create the custom program or collect sales tax from its client if the item is separately stated on the invoice. The taxpayer is not required to collect Indiana sales and use tax for ASG consulting, training or reimbursements.

NMC

This is a service whereby the taxpayer consults with a client to establish network management needs and goals. Products are recommended to achieve this goal, including hardware and software. If the client decides to purchase any of these items from the taxpayer, they are separately invoiced and taxed as appropriate. They are not included in the NMC consulting engagement. This consulting service encompasses only the provision of ideas and know-how to clients.

NMC also provides a monitoring service whereby the taxpayer monitors a client's existing computer network for stability and functionality. These services are generally performed by certified network engineers who are employees of the taxpayer. These services are provided at the client's location, or remotely from the taxpayer's location in Houston.

It is common practice for the taxpayer to request that the clients sign a companion repair contract covering the routers and other hardware. However, this is not a precondition to selling an NMC contract. Such router and

hardware repair contracts are billed separately and taxed if appropriate.

Performance management is also provided; this includes predictive problem management and corrective action, analysis of traffic patterns on the network, recommendation on bandwidth needs and corrections to be made to resolve network anomalies. Again, if these corrections necessitate repairs to computer hardware or the routers, they are handled as a separate service.

Hardware and software are provided by the client. The client also is responsible for providing all electrical, cabling, racks, and environmental support hardware. If these items are purchased from the taxpayer, they are separately invoiced and taxed as appropriate. However, providing these services is in no way dependent on whether the client makes these purchases from the taxpayer or another vendor.

NMC contracts are negotiated for a specified period of time. The taxpayer's fees for these services are determined based on utilization of a "block" of hours, or a flat fee per level of service, or some combination thereof. These fees are separately stated on the invoice. In addition, on certain engagements, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.). These reimbursable expenses are also separately stated on the invoice.

No materials or supplies are used, aside from the copy of canned software used to begin developing the client's use of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

The NMC services do not appear to include any tangible personal property and therefore appear to be purely contracts for professional services pursuant to 45 IAC 2.2-4-2.

RULING

To the extent that the taxpayer is not transferring tangible personal property, the taxpayer is not required to collect Indiana sales and use tax on its NMC consultation, management, or repair services. NMC reimbursements are not subject to Indiana sales and use tax.

ECG/INT

STATEMENT OF FACTS

The ECG and INT divisions provide the same networking services, but to clients of different size and technical capabilities. They analyze and evaluate the clients' current systems, consult up-front as to their network needs, and propose modifications as necessary.

The analysis reviews an existing network (with related diagrams of business flow and physical connectivity), and covers all areas of networks, including wiring, LAN/WAN topologies, existing hardware and software, hubs, bridges, routers and switches. Professional computer specialists assess the current network in relation to future needs, delineates potential weaknesses or shortfalls, and issue a report. The report sets forth a summary of the taxpayer's professional assessment of current operations, ideas for improvement and enhancement, and resources needed to accomplish the desired goals.

At the client's request, the taxpayer will provide hardware and software, install same, and configure the system to perform as required. All these sales and services are billed and taxed separately, if appropriate.

Depending on the engagement, an employee of the taxpayer is designated to spend the majority of his or her time at various client sites to monitor the network and provide any support services that are necessary to keep it functioning at peak efficiency. This includes loading software, monitoring network activity, installing software updates, and administrative tasks (maintain location lists of all hardware, contact manufacturer to update warranty data). These services are provided as an adjunct to the client's existing MIS department, or the client's entire MIS function will be outsourced to the taxpayer.

It is common practice for the taxpayer to request that the clients sign a companion repair contract covering the routers and other hardware. However, this is not a precondition to selling an ECG/INT contract. Such router and hardware repair contracts are billed separately and taxed if appropriate.

Fees are determined for the initial evaluation on an hourly or flat-fee basis. Subsequent engagements for system design and network support are negotiated and billed separately, also on an hourly or flat-fee basis. In addition, on certain engagements, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.).

The contracts are negotiated for a specified period of time. The taxpayer's fees for these services are determined based on utilization of a "block" of hours, or a flat fee per level of service, or some combination thereof. These fees are separately stated on the invoice. In addition, on certain engagements, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.). These reimbursable expenses are also separately stated on the invoice. Any materials or supplies used are separately invoiced. Provision of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

The ECG/INT networking services do not appear to include any tangible personal property and therefore appear to be purely contracts for professional services pursuant to 45 IAC 2.2-4-2.

RULING

To the extent that the taxpayer is not transferring tangible personal property, the taxpayer is not required to collect Indiana sales and use tax on its ECG/INT networking consultation, management, or repair services. ECG/INT reimbursements are not subject to Indiana sales and use tax.

TDS

STATEMENT OF FACTS

The taxpayer provides installation and moving services for computers; on-site computers are moved between locations and installed.

Once the computers are moved and installed, they are configured, tested and debugged. These contracts are labor only and do not include the cost of any hardware, software, parts or materials.

The taxpayer provides consulting services with respect to the client's utilization of hardware resources. The taxpayer reviews the client's current hardware, support model, mission-critical components and service level requirements.

Against this information, the taxpayer analyzes the financial viability of various service options (contract, time + materials, warranty, manufacturer, third party, replace vs. repair, and surplus equipment viability). Once these factors have been analyzed, the taxpayer recommends solutions that decrease costs and improve service lives.

The taxpayer provides consulting services with respect to the client's electrical distribution system supplying power to network hardware, in order to minimize or avert system downtime and data loss in the event of power delivery problems. Services performed include close scrutiny of a site's grounding and wiring and an evaluation of technical power quality analysis.

The client receives a power protection strategy that improves productivity, reliability and uptime of computer systems. Recommendations may include rewiring, installation of additional transformers, and the introduction of power protection equipment (surge protectors, etc.). If the client decides to purchase any of these components from the taxpayer, they are separately invoiced and taxed as appropriate. They are not included in the consulting engagement. This consulting service encompasses only the provision of ideas and know-how to clients based on the taxpayer's knowledge and expertise in the computer services field.

For certain contracts, clients will reimburse the taxpayer for direct expenses incurred (such as mileage, hotels, meals, etc.). These reimbursable expenses are also separately stated on the invoice. A general "trip charge" may be billed, depending on the level of service required and the frequency of the repair calls. Provision of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

The TDS services do not appear to include any tangible personal property and therefore appear to be purely contracts for professional services pursuant to 45 IAC 2.2-4-2.

RULING

To the extent that the taxpayer is not transferring tangible personal property, the taxpayer is not required to collect Indiana sales and use tax on its TDS consultation, installation, moving, management, or repair services. TDS reimbursements are not subject to Indiana sales and use tax.

FUTURE CARE

STATEMENT OF FACTS

The taxpayer provides toll-free telephone support for various commercial software programs (both operation and application).

The taxpayer is authorized to license Banyan network operating software programs. Clients are not required to destroy or return the software at the end of the license period. This program provides the capability for computers in various locations to communicate efficiently over data transmission lines. The program does not change the basic operating functions of the individual computers. Once the network software is installed and configured, it becomes unique to that client.

In addition, the taxpayer provides guarantees to clients that they will continue to receive software upgrades from manufacturers who do not deal with end users. These upgrades are done over data transmission lines.

The taxpayer provides specialized training to client employees in how to implement and maintain their own help desks. Among the issues addressed are stress management, phone etiquette, and troubleshooting. This service does not provide instruction in how to use any form of software.

Future Care contracts are negotiated for a specified period of time. The taxpayer's fees for these services are determined based on utilization of a "block" of calls, or a flat fee per user, per level of service, or some combination thereof. These fees are separately stated on the invoice. No materials or supplies are used. Provision of these services is not contingent upon the client's purchasing other services, hardware or software.

DISCUSSION

The taxpayer's Future Care contracts primarily involve the performance of services. However, two elements of Future Care are subject to Indiana sales tax. The taxable elements are the licensing of network software and the provision of upgrades of the same. The fact that the network software is configured in a unique manner for every client does not make the software custom. This is simply using a canned program within its intended parameters. The fact that the software or the upgrades are transmitted over phone lines and not via a tangible medium does not change the taxable nature of the transaction.

RULING

The taxpayer's future care contracts are subject to Indiana sales and use tax to the extent that those contracts include the provision network software, upgrades or other tangible personal property. Telephone support and training services, when contracted separate from canned software or upgrades, are not subject to Indiana sales and use tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, changes in a statute, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

INDIANA DEPARTMENT OF REVENUE